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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

SALES DRIVERS, HELPERS & BUILDING CONSTRUCTION DRIVERS, LOCAL UNION 859, OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the District of Columbia Circuit, entered on December 8, 1955, setting aside an unfair labor practice order issued by the Board against respondent Union.

OPINIONS BELOW

The opinion of the court below (Appendix A, *infra*, pp. 16-26) is not yet reported. The decision

and order of the Board (J.A. 15a-22a)[1] are reported at 110 NLRB 2192.

JURISDICTION

The judgment of the court below (Appendix A, *infra*, pp. 27-28) was entered on December 8, 1955. On February 27, 1956, by order of Mr. Chief Justice Warren, the time for applying for a writ of certiorari was extended to March 24, 1956 (*infra*, p. 28). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 and under Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 147, 29 U.S.C. 160(e), hereafter called the Act).

QUESTION PRESENTED

Whether the Board may properly conclude that, where the employer involved in the primary labor dispute may be effectively picketed at his separate place of business, the extension of the picket line to other work sites, where the primary employer and neutral employers also work, violates Section 8(b)(4)(A) of the Act.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B, *infra*, p. 29.

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[1] The reference "J.A." designates the portion of the record printed as a joint appendix to the briefs of the parties in the court below.

STATEMENT

A. *The Board decision*

Campbell Coal Co. has two ready-mix concrete plants in Atlanta, Georgia, from which its truck drivers pick up the concrete and deliver it to construction sites in the area (J.A. 17a; 10a).[2] These drivers enter and leave the ready-mix plants several times daily, spending about a quarter of their working time at the plants. They spend a like amount of time en route to and from the construction sites, and the remaining half of their working time at the construction sites themselves. At these sites the truck drivers, following directions by the contractors, unload the ready-mix from the truck into designated receptacles and building forms.(J.A. 18a; 10a).

On June 9, 1954, in protest against Campbell's discharge of a number of ready-mix truck drivers, respondent Union called a strike of Campbell's employees. It also began, and continued to picket Campbell's two ready-mix plants throughout the period relevant herein (J.A. 18a; 9a).

In addition to picketing Campbell's plants, union pickets followed Campbell trucks from the

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[2] The facts are stipulated. The parties waived a hearing and issuance of proposed findings by a Trial Examiner and submitted the case directly to the Board for decision (J.A. 16a).

On August 16, 1954, the United States District Court for the Northern District of Georgia issued an injunction under Section 10(l) of the Act, barring respondent Union from engaging in the construction project picketing hereafter described, pending final determination of the issue by the Board. *Getreu* v. *Sales Drivers, etc.*, 34 LRRM 2750.

ready-mix plants to various construction projects where delivery of the company's product was to be made (J.A. 25; 17). At these sites, the Union agent advised the contractor or his representative of the dispute with Campbell and asked him not to accept delivery of the concrete.[3] If delivery was refused, the Union took no further action, but, where delivery of the Campbell ready-mix was accepted, Union agents picketed the immediate area of the truck with signs which read:

> Employees of Campbell Coal Company on strike in protest of discharges against Union employees. Sales Drivers, Helpers and Building Construction Drivers, Local 859, AFL.

The picketing continued only so long as Campbell's trucks remained on the construction site. (J.A. 18a; 10a-11a.)

In some instances, employees of the contractors working on the construction project quit work for the duration of the picketing. It was stipulated that the reason assigned by the employees for such work stoppages was the presence of the Union's picket sign. The Union agents did not inform the employees who quit work, or other employees working on the picketed projects, that the picketing

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[3] The Union had no dispute with any of the contractors on these projects (J.A. 3a, 9a). They consisted of the following firms: George A. Fuller Construction Company, Southeastern Construction Company, The Flagler Company, Inc., Barge-Thompson Company, Ira H. Hardin Company, Wesley & Company, Inc., and Thompson & Street Company (J.A. 2a-3a, 12a).

was not intended as an appeal to them not to work. (J.A. 11a.)

On the basis of the foregoing facts, the Board concluded that the picketing at the construction projects induced employees of the neutral employers thereon to quit work, with an object of forcing these employers to cease doing business with Campbell, and that the picketing was violative of Section 8(b)(4)(A) of the Act (J.A 19a). The Board viewed this case as coming within the scope of its ruling in *Washington Coca Cola Bottling Works, Inc.*, 107 NLRB 299, *enforced sub nom., Brewery and Beverage Drivers* v. *National Labor Relations Board*, 220 F. 2d 380 (C.A.D.C.), where it had held that picketing at places where both the primary employees and neutral employees were at work was violative of Section 8(b)(4)(A), if the primary employer could effectively be picketed at his own separate premises in the area.

The Board ordered the Union to cease and desist from the unfair labor practices found and to post appropriate notices (J.A. 20a-22a).

B. *The decision of the court below*

The Court of Appeals set aside the Board's order and remanded the case to the Board "for its further consideration, if desired" (Appendix A, p. 26). The court, reading the Board's decision as resting on "a rigid rule that when [a] separate situs is available picketing at a common situs is prohibited" (*id.*, p. 20), rejected this view, for the reason that (*id.*, pp. 22-23):

> Section 8(b)(4) does not contain a provision which condemns concerted activity of employees with respect to their own employer merely because it appears at a place where it comes to the attention of and incidentally affects employees of another, even where the activity could be carried on at a place where the primary employer alone does business. The existence of a common site, of such incidental effect, and of another place which can be picketed, are factors to be considered in determining whether or not the section has been violated, but alone are not conclusive. The presence of these factors does not warrant a failure to consider other facts which are relevant and perhaps countervailing. See *National Labor Relations Board* v. *General Drivers, Warehousemen and Helpers, Local 968*, 225 F. 2d at 209-210. No rigid rule which would make these few factors conclusive is contained in or deducible from the statute. To read it into the statute by implication would unduly invade the application of section 13 * * *. [Footnotes omitted.] [4]

REASONS FOR GRANTING THE WRIT

The question here, *viz.*, whether the Board may properly conclude that, where the primary em-

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[4] The court pointed out that its earlier affirmance of the Board's order in the *Washington Coca Cola* case, p. 5, *supra*, did not constitute approval of such a rule, "but must be construed only as agreement with the conclusion the Board there reached, which rested in considerable part upon additional findings" (Appendix A, p. 22).

ployer involved in a labor dispute may be effectively picketed at his separate place of business, the union violates Section 8(b)(4)(A) of the Act when it fails to confine its picketing to those premises but extends it to a common site where both the primary employees and neutral employees are also engaged in work, was the subject of an earlier petition for certiorari which this Court denied. *National Labor Relations Board* v. *General Drivers, Warehousemen and Helpers, Local 968*, No. 476, October Term, 1955, certiorari denied, 350 U.S. 914, December 5, 1955. However, in *General Drivers*, unlike here, the primary employer, Otis Massey, had two sets of employees, truck drivers and construction workers. The union's dispute involved the truck drivers, who picked up materials at Otis Massey's warehouse and delivered them to various construction projects; Otis Massey's construction workers, on the other hand, rarely came to the warehouse. See Board's Petition for Certiorari in No. 476 at p. 5. Accordingly, the question of whether a primary employer may lawfully be picketed at a common project when he can be effectively picketed at his own separate premises in the area was not necessarily reached in *General Drivers* since, in the Court of Appeals' view (225 F. 2d at 208, 210), the union was entitled to appeal to the Massey construction workers as well as to its truck drivers, and the construction workers could not be effectively appealed to at their employer's separate premises (see n. 15, *infra*).

In this case, however, there is only one set of primary employees who work both at the primary employer's separate premises and at the common project. In these circumstances, and in view of the further considerations set forth below and the fact that related problems respecting the interpretation of Section 8(b)(4)(A) are now pending before this Court in two other cases,[5] the Board feels warranted in again presenting the question to this Court.

1. The problem is an important and recurring one in the administration of the Act, affecting not only the construction industry but all industries where the employees involved in the primary dispute transport products from the primary employer's premises to those of neutral employers. Moreover, it is a problem which was left unresolved by this Court's decisions in *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U. S. 665; *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U. S. 675; *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U. S. 694.[6] The *Rice Milling* case merely involved a picket line at the primary employer's separate premises; in the other two cases, the picketing, al-

[5] *National Labor Relations Board* v. *Business Machine and Office Appliance Mechanics Conference Board*, No. 711, this Term; *Associated Musicians* v. *National Labor Relations Board*, No. 635, this Term.

[6] *United Brotherhood of Carpenters and Joiners of America* v. *National Labor Relations Board*, 341 U.S. 707, the fourth case in this group, did not involve picketing but a direct request to secondary employees to strike.

though it occurred at the common project, was clearly aimed at neutral employers.[7] Thus, there was no occasion in any of these cases to consider whether Section 8(b)(4)(A) of the Act bars common project picketing even when it is ostensibly aimed at the primary employer whose employees are at work there, if the separate premises of the primary employer provide adequate opportunity to picket that employer.

2. The conclusion of the court below rests, we think, on the erroneous premise that, since "Section 8(b)(4) does not contain a provision which condemns concerted activity of employees with respect to their own employer merely because it occurs at a place where it * * * affects employees of another" (Appendix A, p. 22), there is no statutory basis for invalidating picketing of the primary employer when it extends beyond the primary employer's separate premises. This omission is inconclusive for, even without a special provision, the literal language of Section 8(b)(4)(A) would interdict virtually all picketing, including picketing of the primary employer. The Section must be read in the light of "the dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and

[7] The picket signs did not name the primary employer but characterized the entire job as unfair; the picketing in *Denver* was preceded by an arrangement between the union and the secondary employees that it would constitute a signal for them to strike; the picketing in *Electrical Workers* occurred while no primary employees were on the common project (341 U.S. at 678-679, 697).

of shielding unoffending employers and others from pressures in controversies not their own." *National Labor Relations Board* v. *Denver Building & Construction Trades Council*, 341 U. S. 675, 692. The Board's separate premises test is but a means of administering the provision so as to accommodate those dual objectives.

In short, the terms of Section 8(b)(4)(A) prohibit the inducement of secondary employees to stop work, where an object is to exert pressure on their employers to cease doing business with the primary employer. Even a traditional picket line at the primary employer's own plant has an impact on the employees of neutral employers, and may be said to have, as one of its objects, the cessation of business relations between these employers and the primary employer.[8] When the picketing of the primary employer occurs at places where the primary employees work along with other employees, existence of the means and objective interdicted by Section 8(b)(4)(A) is even plainer. For the "reluctance of workers to cross a picket line is notorious" (*Printing Specialties & Paper Converters Union* v. *LeBaron*, 171 F. 2d 331, 334 (C.A. 9)), and, if they refuse to cross, the only way that their employers can extricate them-

[8] *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. at 670. See also *Schultz Refrigerated Service*, 87 NLRB 502, 505: "Plainly, the object of all picketing at all times is to influence third persons to withhold their business or services from the struck employer. In this respect there is no distinction between lawful primary picketing and unlawful secondary picketing proscribed by Section 8(b)(4)(A)."

selves is by ceasing business with the primary employer.[9] Indeed, the picketing at the construction projects here confirms this, for the picket signs, though ostensibly addressed to the primary employer and his employees, caused neutral employees to walk off the job, and the picket line was imposed only when the neutral contractor refused to discontinue handling Campbell's ready-mix concrete[10] (p. 4, *supra*).

However, to read Section 8(b)(4)(A) as barring even a picket line at the primary employer's plant would leave no room for legitimate primary activity, protected by Sections 7 and 13 of the Act. An accommodation between these Sections and Section 8(b)(4)(A) is therefore required, which privileges inducement of secondary employees resulting from the picketing at the primary employer's plant, notwithstanding Section 8(b)(4)(A), on the ground that it is merely "incidental" to lawful primary activity.[11]

Similarly, to regard all picketing at a common project as interdicted by Section 8(b)(4)(A)

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[9] See *National Labor Relations Board* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 688; *Piezonki d/b/a Stover Steel Service* v. *National Labor Relations Board*, 219 F. 2d 879, 881 (C.A. 4).

[10] See *National Labor Relations Board* v. *Local Union No. 55*, 218 F. 2d 226, 231 (C.A. 10); *National Labor Relations Board* v. *Associated Musicians*, 226 F. 2d 900, 904 (C.A. 2), certiorari applied for, No. 635, October Term, 1955.

[11] *The Pure Oil Co.*, 84 NLRB 315; *Ryan Construction Corp.*, 85 NLRB 417; *National Labor Relations Board* v. *International Rice Milling Co.*, 341 U.S. 665; *DiGiorgio Fruit Corp.* v. *National Labor Relations Board*, 191 F. 2d 642, 649 (C.A.D.C.), certiorari denied, 342 U.S. 869.

would, in cases where the primary employees spent most or all of their working time there, provide no room for primary picketing activity in industries where employees work in this fashion. This, too, calls for an accommodation between the competing and conflicting legislative aims. The balance struck by the Board is to permit picketing of the primary employer at points where his employees work with other employees only when the separate premises of the primary employer afford no adequate opportunity for effective picketing of the primary employer. Where this condition exists, [12] and provided that the union has made every reasonable effort to confine its picketing at the common project to the primary employer,[13] such picketing is not regarded as "unlawful because employees of the secondary employers, or employees of other employers, due to their habitual unwillingness to cross picket lines, refused to do so, for such effects are within the realm of the 'incidental' " (*National Labor Relations Board* v. *Service Trade Chauffeurs,* 191 F. 2d 65, 68 (C.A. 2)). On

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[12] See *Schultz Refrigerated Service,* 87 NLRB 502, 503, 507, n. 13; *Moore Drydock Co.,* 92 NLRB 547, 549, n. 6; *Pittsburgh Plate Glass Co.,* 110 NLRB 455, 457.

[13] That is, as the Board stated in *Moore Dry Dock Co.,* 92 NLRB 547, 549:

> (a) The picketing is strictly limited to times when the *situs* of dispute is located on the secondary employer's premises; (b) at the time of the picketing the primary employer is engaged in its normal business at the *situs;* (c) the picketing is limited to places reasonably close to the location of the *situs;* and (d) the picketing discloses clearly that the dispute is with the primary employer [footnotes omitted].

the other hand, where the primary employer may be effectively picketed at his own separate premises, picketing at the common project is not privileged, and the impact of such picketing on secondary employers and their employees would not be exempted from the otherwise applicable ban of Section 8(b)(4)(A).[14]

The considerations supporting this accommodation are that, where the primary employees are accessible at their employer's separate premises, confining the picketing to that place enables the union to exert primary pressure while at the same time holding to a minimum the risk of implicating neutral employers. In these circumstances, the only basis for allowing the picketing to be extended to other work sites of the primary employer is to increase the effectiveness of the picketing by reaching the employees of neutral employers, the very thing which Section 8(b)(4)(A) seeks to avoid. A legitimate basis for increasing the risk of implicating neutrals is afforded only in the situation where, because the primary employer's premises afford no opportunity for effective picketing, common project picketing is necessary to avoid a total obliteration of the union's right to engage in primary activity. Since these considerations are not "wide of any reasonable mark" (*Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 611), the resultant accommodation made by the Board is entitled to stand.

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[14] See *Washington Coca Cola Bottling Works, Inc.*, 107 NLRB 299, enforced, 220 F. 2d 380 (C.A.D.C.).

3. The decision of the court below is in conflict with *National Labor Relations Board* v. *Truck Drivers & Helpers Local No. 728*, 228 F. 2d 791 (C.A. 5, January 7, 1956). In that case, as here, the union could effectively picket National, the primary employer at its separate plant. It nevertheless extended the picketing to the premises of Ford where National's employees picked up trucks for transport to National's plant. The Board held that the picketing at Ford's premises, although ostensibly directed at National, tended to induce Ford's employees to stop work and thereby force a cessation of business relations between Ford and National, and that, since National could be effectively reached at its own plant, the picketing was violative of Section 8(b)(4)(A) (111 NLRB 483, 487). The Fifth Circuit sustained the Board, accepting, unlike the court below, the Board's basic premise that the picketing of the primary employer at the common project was not privileged because "it was clearly not necessary for respondent Union to picket at Ford's premises in order to reach National's employees for *all* of National employees not only could but they were in fact notified of the labor dispute by the picketing at National's terminal on South Street" (228 F. 2d at 796).[15]

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[15] In this respect moreover, the court distinguished its earlier decision in *General Drivers* (p. 7, *supra*), pointing out that in that case "the union was permitted merely to picket the common premise in order to reach *other* employees of the primary employer, who, as we especially noted, almost never came to the primary employer's principal situs, the warehouse" (228 F. 2d at 796).

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for certiorari should be granted.

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MARCH 1956.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12605

SALES DRIVERS, HELPERS & BUILDING COUSTRUCTION DRIVERS, LOCAL UNION 859, OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

On Petition for Review and on Cross-Petition for Enforcement of an Order of the National Labor Relations Board

Decided December 8, 1955

Before PRETTYMAN, BAZELON and FAHY, Circuit Judges.

FAHY, *Circuit Judge:* On findings of fact based upon a stipulation among the appellant Union, the General Counsel of the National Labor Relations Board, and the Associated General Contractors of America, Inc., Georgia Branch, the Board entered an order against the Union requiring it to cease and desist conduct found to violate section 8(b)(4)(A) of the Taft-Hartley Act, the so-called secondary boycott provision.[1] The Union petitions

[1] This section provides:

"(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

us to set aside the order and the Board petitions us to enforce it.

The case involves picketing at sites shared by the struck employer and neutral employers. The pertinent findings of fact contained in the Board's decision are in substance as follows: Campbell Coal Company is engaged in the sale of building materials including ready-mixed concrete. It operates two ready-mix concrete plants in Atlanta, where it employs, among others, men who drive trucks by which Campbell delivers its ready-mix to construction sites. At the delivery points the truck drivers at the direction of the contractors on those sites operate the unloading mechanism of the truck so as to place the ready-mix at places and in receptacles designated and provided by the contractors. Frequently the unloading is accomplished by pouring the mixture into forms so placed that when dry the mixture becomes part of the structure on the project. The drivers spend approximately 25 per cent of their working time at their employer's plants, 25 per cent en route, and 50 per cent at construction sites.

The Union initiated a strike against Cambell be-

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person. * * *" 61 Stat. 141 (1947), 29 U.S.C. § 158(b)(4)(A) (1952).

cause of the discharge of a number of the truck drivers. It picketed the two ready-mix plants. In addition the pickets followed some of the trucks from the plants to various construction projects where the trucks made deliveries, although the Union had no dispute with any of the contractors on such projects. It is this latter picketing which the Board found to be illegal. The pickets carried signs which read as follows:

> "Employees of Campbell Coal Company on strike in protest of discharges against Union employees. Sales Drivers, Helpers and Building Construction Drivers, Local 859, AFL."

The picketing continued so long as Campbell's trucks remained on the construction site and was confined to the immediate area of the trucks or as close as the pickets could get without trespassing on private property. Except for displaying the picket signs, the Union's pickets did not communicate with any employees working at the projects.

On these findings [2] the Board reached the conclu-

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[2] Some additional facts are contained in the stipulation but are not the subject of findings by the Board. No contention in this court is made by the Board upon the basis of these facts, although some of them are enumerated in its brief. These are that at each construction site the Union agent advised the contractor or his representative of the dispute with Campbell and asked him not to accept delivery of the concrete. If delivery was refused the Union took no further action, but if accepted the Union agents picketed the immediate area of the trucks with the signs already described. The picketing continued while Campbell's trucks remained on the construction site. In some instances employees of the contractors working on the construction projects quit work for the duration of the picketing, assigning as the reason therefor the presence of the picket signs. The Union agents did not inform employees

sion that section 8(b)(4)(A) was violated because the picketing was conducted "to force secondary employers located on such [construction] projects to cease doing business with Campbell, by inducing and encouraging the employees of said employers to engage in a strike * * *."

In so ruling the Board said it relied upon "the reasons stated in *Washington Coca-Cola*, 107 NLRB No. 104 [p. 299], affirmed in *Thurston Motor Lines, Inc.*, 110 NLRB No. 122 [p. 748] * * *." It considered without merit the Union's defense that its picketing of the construction projects was within the area of permissible conduct recognized by the Board in *Moore Dry Dock Company*, 92 N.L.R.B. 547. In that case the Board laid down certain conditions which a union must meet in order for its picketing to be lawful where the site picketed is shared by the primary employer and neutral employers. These conditions are that the picketing disclose clearly that the dispute is with the primary employer only, that the picketing is limited to times when the dispute situs is on the neutral employer's premises, that the primary employer is engaged in its normal business at the common situs when the picketing takes place, and that the picketing is confined to areas reasonably close to the situs of the dispute. The Union here contends that it has met these conditions but that

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who quit or other employees on the projects that the picketing was not intended as an appeal to them not to work, but pickets did not speak to or communicate with any employees on the projects other than by displaying the picket signs, or in any manner threaten, coerce, or intimidate the employees to quit work or offer any other form of inducement or encouragement so to do.

the Board has added another and absolute prerequisite that no situs for effective picketing other than the common one be available. While in *Moore Dry Dock* it was a fact that no such separate situs was available, the Board decision did not specify this as one of the conditions for lawful picketing at a common situs. We agree with the Union that in the case at bar the Board has added this condition and has applied a rigid rule that when another such separate situs is available picketing at a common situs is prohibited. This is borne out by the findings relied upon by the Board, above set forth, by its brief in support of its decision, and by the reasoning of the decision itself. As to the latter, the *Thurston* case is expressly relied upon. There the Board held that picketing at a common situs was unlawful "when the employer has a primary place of business in the locality which can be picketed by the labor organization with which the employer has a dispute." 110 N.L.R.B. at 754. Since there was such a separate situs it was concluded that the picketing at the situs which was common to the struck employer and the secondary employer was not primary, but was "an attempt to induce and encourage the employees of various secondary employers to engage in a strike or a concerted refusal in the course of their employment to handle or work on Thurston's goods or perform services involving Thurston's goods, an object thereof being to require such secondary employers to cease doing business with Thurston."[3] *Ibid.*

[3] Although these statements are taken from the trial examiner's findings of fact, they must be regarded as proper expressions of the rule upon which the Board depends in the instant case. In the first place, the Board in *Thurston* adopted these

In *Washington Coca-Cola, supra,* decided before *Thurston,* and now also relied upon, the Board answered a union's contention that certain picketing was protected by the *Moore Dry Dock* rule by holding the rule inapplicable whenever the struck employer has a permanent place of business at which picketing can be effectively carried on.

Finally, we consider the Board's brief. It states:

> "Accordingly, the question is not * * * whether 'the dispute reaches to the area which is being picketed,' but whether Campbell, the primary employer, had separate premises in the area which provided the Union with a fixed and adequate base for carrying on its primary activity. The record shows that, like the Company in *Coca-Cola, supra,* it did have such premises. * * * In these circumstances the Board's common situs rules are inapplicable, there being no excuse, other than the impermissible one of increasing the effectiveness of the picketing, for allowing the Union to extend

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findings. And in the second place, any other conclusion would rob of meaning the Board's reliance in the instant case upon "the reasons * * * affirmed in *Thurston Motor Lines, Inc.* * * *" since the Board gave no independent expression of reasons for the *Thurston* decision. It is true that the examiner assigned an alternative reason in *Thurston,* namely, that another *Moore Dry Dock* requirement was absent inasmuch as the picketing did not clearly disclose that the dispute was with the primary employer only. But the Board could not have intended to refer to this reason as applicable to the instant case, since here the picket signs were clear and there were no attempts by those picketing to induce employees of neutral employers not to cross the picket line, as there were in *Thurston.* Moreover, the Board's brief, discussed in the text *infra,* demonstrates beyond doubt that the rule relied upon is the one above outlined.

it to the construction projects and thereby involve neutral employers in its dispute with Campbell."

Affirmance by this court of the *Coca-Cola* order, *sub nom. Brewery and Beverage Drivers and Workers Local Union No. 67* v. *NLRB*,——U.S. App. D.C. ——, 220 F. 2d 380, did not constitute approval of the rule now advanced by the Board, but must be construed only as agreement with the conclusion the Board there reached, which rested in considerable part upon additional findings. Here, in contrast, the decision rests solely upon the fact that Campbell had other places of business, not common with a neutral employer, which could be and were being picketed.[4] Yet Campbell's employees worked at these places only about 25 per cent of their time and spent 50 per cent with the trucks at places where Campbell did business coincidently with neutral employers. Section 8(b)(4)(A) does not contain a provision which condemns concerted activity of employees with respect to their own employer merely because it occurs at a place where it comes to the attention of and incidentally affects employees of another, even where the activity could be carried on at a place where the primary employer alone does business. The exist-

[4] These were not the only factors considered by the Board in its decision recently upheld in *NLRB* v. *Associated Musicians of Greater New York, Local 802*, No. 23550, 2d Cir., Nov. 3, 1955. In that case requests were made by Union representatives that the secondary employers cease doing business with the primary employer. This was true in the present case, but was not relied upon by the Board. See note 2 *supra*. There are also other factual distinctions between the two cases.

ence of a common site, of such incidental effect, and of another place which can be picketed, are factors to be considered in determining whether or not the section has been violated, but alone are not conclusive.[5] The presence of these factors does not warrant a failure to consider other facts which are relevant and perhaps countervailing. See *NLRB* v. *General Drivers, Warehousemen and Helpers, Local 968*, 225 F. 2d at 209-210. No rigid rule which would make these few factors conclusive is contained in or deducible from the statute. To read it into the statute by implication would unduly invade the application of section 13[6] which preserves the right to strike "except as specifically provided" in other provisions of the Act. It is not specifically provided that picketing at a common site, with an incidental effect upon employees of a neutral employer, is unlawful in every case where picketing could also be conducted against the primary employer at another of its places of business.

This view has been set forth at length in *NLRB* v. *General Drivers, Warehousemen and Helpers, Local 968*, 225 F. 2d 205 (5th Cir.). There the labor dispute involved four warehouse employees who occasionally made deliveries to construction sites where the remainder of the employer's work force was engaged. Employees of neutral employers were also working at these sites, but not at

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[5] In addition to *Moore Dry Dock*, *supra*, see *Schultz Refrigerated Service*, 87 N.L.R.B. 502; *Oil Workers International Union (The Pure Oil Co.)*, 84 N.L.R.B. 315; *NLRB* v. *Service Trade Chauffeurs*, 191 F. 2d 65 (2d Cir.); *NLRB* v. *Local Union No. 55*, 218 F. 2d 226 (10th Cir.).

[6] 61 Stat. 151 (1947), 29 U.S.C. § 163 (1952).

the primary employer's warehouse. Nevertheless, these common sites were picketed along with the warehouse, regardless of whether any of the four employees made deliveries to the construction projects. The picket signs together with pamphlets distributed by the pickets showed that the strike was against only the primary and no other employer, and that the picket line should be considered as directed only towards those locations within the projects where primary employees were working. The court held the Board erred in concluding that the Union was in violation of section 8(b)(4)(A) merely upon the basis of findings that "the drivers and warehousemen involved were employed 'not at the construction projects but at the Otis Massey [the primary employer's] warehouse,' so that the warehouse location was the sole 'situs of the Union's dispute,' and the place where it could 'adequately publicize' its private controversy with the primary employer without disrupting work of the other neutral employers." *Id.* at 208. Although such a finding as to situs, arrived at in part by applying the same "adequate publicity" rule here proposed, brought the case within the *Moore Dry Dock* criterion barring picketing at a common situs which is not the situs of the dispute, the court said that the approval which had been given by the courts to the standards set forth in *Moore Dry Dock* for lawful picketing at a common site,

> "* * * was necessarily based upon substantial evidence that the unlawful objective denounced by the statute actually existed, rather than upon the inferentially suggested theory that this ultimate and controlling statutory in-

quiry may be effectually supplanted merely by Board findings that the real 'situs' of a labor dispute exists at a location other than that determined by the conduct of the parties, at which place alone it may be 'adequately' publicized with impunity under the Act, and thereby inferring from such findings, as here, that the unlawful objective exists. Indeed, such a theory would, we think, elevate the Board formulated 'criteria' by judicial fiat to a vantage point from which it could, in effect, circumvent the statute, for in this type instance it would substitute Board inferences as to the lawfulness or unlawfulness of an objective, based purely on its own judgment as to the propriety and adequacy of the means employed in a labor dispute, for the sole statutory test of unlawfulness of the end or objective sought, contrary to the Supreme Court's pronouncements that it is ' "the objective of the unions' secondary activities * * * and not the quality of the means employed to accomplish that objective, which was the dominant factor motivating Congress in enacting that provision." ' International Brotherhood of Electrical Workers Local 501, v. N.L.R.B., 341 U. S. 694, 704 * * *." 225 F. 2d at 209-210.

We agree with this analysis. In this case the Board does not even press the contention that the existence of a separate situs of the primary employer causes the *Moore Dry Dock* standards to bar picketing at a common situs. Rather it seems to assert that these standards need not be con-

sidered if effective picketing can be conducted at a situs not common. Nevertheless, this difference of approach and whatever factual differences exist between *Brewery and Beverage Drivers* and this case do not render the Fifth Circuit's reasoning any less pertinent. A violation of section 8(b)(4)(A) is not to be found by a rule of decision based upon findings which are inadequate to support the conclusion reached.

Since the decision of the Board, as shown by its findings and reasoning, turns upon the fact of concerted activity at a common situs where one not common was available, we will set aside the order, notwithstanding the picketing had incidental effect upon employees of neutral employers, but will remand the case to the Board for its further consideration, if desired. Otherwise our decision would constitute an approval of a rigid rule which the language of the statute does not support.

It is so ordered.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

October Term, 1955

No. 12,605

SALES DRIVERS, HELPERS & BUILDING CONSTRUCTION DRIVERS, LOCAL UNION 859, OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, AFL, PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed: December 8, 1955.

(S.) JOSEPH W. STEWART,
Clerk.

On Petition for Review and on Cross-Petition for Enforcement of an Order of the National Labor Relations Board.

Before: Prettyman, Bazelon and Fahy, Circuit Judges.

DECREE

This case came on to be heard on the record from the National Labor Relations Board and on the petition for review and the cross-petition for enforcement of an order of said Board, and was argued by counsel.

On Consideration Whereof, It is ordered and decreed by this Court that the order of the National Labor Relations Board on review in this case be, and it is hereby, set aside, and that this case be, and the same is hereby, remanded to the said National Labor Relations Board for its further consideration, if desired.

Dated: December 8, 1955.

Per Circuit Judge Fahy.

A true Copy,

Test: (S.) Joseph W. Stewart,
Clerk of the United States Court of Appeals, for the District of Columbia Circuit. [Seal]

SUPREME COURT OF THE UNITED STATES

No. —, October Term, 1955.

National Labor Relations Board, petitioner,

vs.

Sales Drivers, Helpers & Building Construction Drivers, Local Union 859, of International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL.

Order Extending Time to File Petition for Writ of Certiorari

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause

be, and the same is hereby, extended to and including March 24, 1956.

(Sgd) EARL WARREN,
Chief Justice
of the United States.

Dated this 27th day of February, 1956.

APPENDIX B

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), are as follows:

Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; * * *

* * * * *

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